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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
Request of Cellular Communications of Puerto Rico, Inc. to Hold an Auction to License Cellular RSA No. 727A, Ceiba, Puerto Rico	)	RM-8897

To: The Commission

REPLY COMMENTS
OF
Moving Phones Partnership, L.P.
and
FutureWave General Partners, L.P.

Moving Phones Partnership, L.P. ("Moving Phones") and FutureWave General Partners, L.P. ("FutureWave") by their attorneys, respectfully submit their Reply Comments responsive to the invitation extended by Public Notice ("Notice") of the Federal Communications Commission ("Commission" or "FCC") of October 24, 1996, concerning the Petition for Declaratory Ruling or, in the Alternative, for Rulemaking ("Petition") filed in the

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above-styled matter by Cellular Communications of Puerto Rico, Inc.[1]

A. IT IS UNFAIR TO ASSUME THAT ALL LOTTERY APPLICANTS ARE SPECULATORS.

1. One of the primary arguments presented by those in favor of auctions is the notion that the lottery applicant pools are dominated by speculators. Bell Atlantic NYNEX Mobile, Inc. ("BANM")and Western Wireless Corporation ("Western Wireless"), the only parties to file Comments in favor of employing auctions to award all remaining cellular RSA licenses, relied heavily on the following misconceptions:

> 1) all lottery applicants are motivated solely by the opportunity to profit from speculation;[2]
>
> 2) lottery applicants do not hold a sincere interest in building out the cellular markets for which they may be licensed;[3] and

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[1] *Public Notice*, Public Comment Invited, Cellular Communications of Puerto Rico, Inc. Petition For Declaratory Ruling or Rulemaking to Determine Whether Competitive Bidding Procedures should Be Used to License Certain Cellular Service Areas, DA-96-1685 (October 24, 1996).

[2] Bell Atlantic NYNEX Mobile, Inc. at 9; Western Wireless Corporation at 6.

[3] Bell Atlantic NYNEX Mobile, Inc. at 5.

> 3) lottery applicants lack the requisite experience and resources to provide cellular service in the markets for which they may be licensed.[4]

Indeed, Western Wireless declared that "all that a lottery will accomplish is to grant a speculator the ability to reap a windfall by selling a license to a company economically motivated to provide service in these markets - the company most likely to win the license in an auction."[5] Not only are BANM's and Western Wireless' statements unsubstantiated, but they are also an insult to the vast majority of lottery applicants who hold a genuine interest in acquiring a license to provide cellular service.

2. BANM and Western Wireless' conjecture does not serve to illuminate the issues before the Commission. Rather, it unjustly calls into question the sincerity of hundreds of parties who saw fit to file and prosecute applications in accordance with the Commission's then-existing licensing procedures. Such conjecture fully disregards the significance to be accorded the numerous

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[4] Western Wireless Corporation at 6.

[5] Id.

non-wireline cellular RSA applicants who not only obtained construction permits, but indeed proceeded to build and operate their systems. Implicit in the assertions of BANM and Western Wireless is that the past actions of a small minority of RSA applicants who engaged in speculative activities have somehow inescapably infected the entire cellular RSA lottery applicant pool. Not only does such exaggerated pronouncement overstate the argument, but it would also appear to offend the sensibilities of the entire Commission. It is an affront to the FCC to insinuate that it is incapable of awarding licenses to qualified applicants based on a lottery process employed as recently as 1995.[6] While auctions are now the means employed for awarding licenses in response to applications filed after July 26, 1993, with respect to applications filed prior to that date, lotteries have been successfully conducted on three separate occasions

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[6] *See* In the Matter of Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Fixed Service and Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253 - Competitive Bidding, MM Docket No. 94-131, Report and Order, FCC 95-230, released June 30, 1995. (Holding that MDS licenses for which applications were filed prior to July 26, 1993 would be awarded through lottery.)

since Congress' passage of the Omnibus Reconciliation Act of 1993.[7] Employment of lotteries for these remaining cellular RSA markets will impose no greater risk of speculative activities than did the three previous lotteries conducted to award licenses for which applications were filed prior to July 26, 1993.

B. APPLICATIONS TO PARTICIPATE IN THE RELOTTERY OF THE REMAINING RSAs ARE STILL PENDING.

3. Western Wireless stated in its Comments that:

> A lottery has already been conducted for the remaining RSA markets. The remaining applications for initial RSA construction permits have no rights to a second lottery because their applications have already been prosecuted using the

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[7] *See* In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rulemaking, FCC 93-455, released October 12, 1993. (Holding that IVDS licenses for which applications were filed prior to July 26, 1993 would be awarded through lottery); In the matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Memorandum and Opinion Order, FCC 94-123, released July 14, 1994. (Holding that cellular unserved areas for which applications were filed prior to July 26, 1993 would be awarded through lottery; *See* Footnote 6.

> existing 'rules of the game' at the time . . . These applications have been dismissed and are no longer pending before the Commission . . .[8]

To support its contention, Western Wireless points to Commission language that states that auctions are the most appropriate means to award cellular unserved area licenses that initially had been granted through lottery but subsequently were revoked. Western Wireless states that the "situation of initial licenses for unserved areas is analogous to the situation at hand . . . [A] lottery was conducted and the tentative selectee was dismissed, failed to construct within 18 months, or had its application granted and the license later revoked due to violations of the Commission's rules."[9]

4. Western Wireless' contention is flawed because the treatment to be accorded remaining applicants for a cellular market following a tentative selectee's application dismissal is distinguishable from that which must ensue in the wake of a permittee's failure to timely construct or a licensee's subjection to revocation of its

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[8] Western Wireless at 7.

[9] Id.

authorization. It must be recognized that the Polk, Arkansas, Monroe, Florida, Goodhue, Minnesota, Barnes, North Dakota, Bradford, Pennsylvania, and Ceiba, Puerto Rico RSAs, which were previously slated for relottery on September 18, 1996, each constitute a market in which the tentative selectee in the original lottery later suffered dismissal of its application. Hence, because the status of the dismissed entity was that of a selectee -- not a permittee or licensee -- all other mutually exclusive applications previously filed in anticipation of lotteries for those markets remained mutually exclusive pending applications. Those filers have every reasonable expectation and right to participate in the lottery process under which they were encouraged to file for as long as it takes the Commission to award a permanent authorization in such market.

5. To suggest as Western Wireless does that conduct of an initial lottery thereby terminates any right of those remaining applicants to participate in a relottery neglects the fact that relotteries have indeed been conducted in the past when the initial selectee incurred dismissal prior to grant of its construction permit. No one ever suggested in those instances that the other

mutually exclusive applicants would be required to refile. Why then should it be suggested at this juncture? Similarly situated applicants should not be subjected to disparate treatment by the Commission.[10]

6. Unquestionably, the discretion accorded the Commission by the Omnibus Budget Reconciliation Act of 1993 to rely upon lottery procedures for selecting among competing applications pending as of July 26, 1993 imposes on the FCC an affirmative obligation to give meaningful consideration to lottery use. That consideration must take into account all equitable factors, as well as factors relating to the effective implementation of overall policy.[11] Fundamental equity, therefore, mandates that those who participated in the cellular RSA filing process in 1988 be accorded the full participatory lottery rights they were initially promised. To do anything less at this point would constitute a grave disservice and seriously undermine the Commission's credibility.

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[10] *See*, Melody Music, Inc. v. Federal Communications Commission, 345 F.2d 730 (D.C. Cir. 1965).

[11] *See*, WAIT Radio v. Federal Communications Commission, 418 F.2d 1153 (D.C. Cir. 1969).

WHEREFORE, the premises considered, Moving Phones and FutureWave respectfully reiterate their request that the Commission refrain from adopting rules that would subject to competitive bidding procedures, rather than lotteries, cellular RSA markets for which applications had been filed before July 26, 1993 but in which the tentative selectees' applications were subsequently dismissed.

Respectfully submitted,

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December 10, 1996

CERTIFICATE OF SERVICE

I, Toni Smith, a secretary in the law offices of Keller and Heckman LLP, hereby certify that on this 10th day of December, 1996, a copy of the foregoing Reply Comments was served by first class mail, postage prepaid, on the following:

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